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Supreme Court of the United States

OCTOBER TERM, 1954.

No. ~~780~~ 88

MARGERET SHIVER WILLIAMS,

Petitioner,

versus

CAROLINA LIFE INSURANCE COMPANY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AND BRIEF IN SUPPORT.)

ROBERT CULPEPPER, JR.,
FRANK S. TWITTY,
Camilla, Georgia.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. .....

MARGERET SHIVER WILLIAMS,
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versus

CAROLINA LIFE INSURANCE COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AND BRIEF IN SUPPORT.)

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on February 23, 1954, rehearing denied on March 20, 1954, and extraordinary motion for rehearing denied on April 21, 1954.

OPINION BELOW.

The opinion of the Court of Appeals has not been reported but a copy of same will be seen at pages 147 through 154 of the Record. The opinion reverses a judgment of the District Court for the Middle District of Georgia in connection with which no opinion was rendered.

JURISDICTION.

The judgment of the Court of Appeals having been entered February 23, 1954, (R 155) and that Court having denied petition for rehearing on March 20, 1954 (R 172) and extraordinary motion for rehearing denied on April 21, 1954, (R 183) the jurisdiction of this Court is invoked under 28 US Code, Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether, in actions under accidental insurance policies where the fact of accident is dependent on circumstantial evidence, the Court of Appeals erred in laying down a novel and restricted standard of proof, in holding that although the evidence shows the death accidental, and of the sort charged in the petition, the cause fails because insured might have met his death *accidentally* in more than one way, all of the sort charged, thus requiring petitioner to "pin-point" the details of the accident, and confusing the real question in the case as to whether the death was accidental, or not accidental, with the inconsequential question of whether the exact and minute details of a proven *accidental* death are shown.

The failure of the Court of Appeals to comprehend the real question in this case constitutes error, and is in direct conflict with the laws of Georgia, rulings of Fifth Circuit Court of Appeals, other circuit courts, and the

United States Supreme Court, in that the effect of the ruling

(a) Completely abrogates the preponderance of evidence rule in Georgia in determining civil cases based on circumstantial evidence and requiring that in deciding such issues the jury must be free of any doubt, and

(b) Applies to the determination of a civil cause, based on circumstantial evidence, the rules obtaining in criminal cases, that is, that the cause of action must be established to a moral and reasonable certainty, and beyond a reasonable doubt, and

(c) Usurps the function of the jury as fact triers, there being in this case no error of law in the trial involved, and the *undisputed, direct* evidence pointing conclusively to the fact of accidental death, of the sort charged, and it being admitted by respondents in their brief before Circuit Court that jury was authorized to find from medical evidence that he did not die from natural causes, and in this situation the jury was deprived of the right to infer, from circumstances based on *undisputed* and *preponderating direct* evidence, that the death in this case was accidental.

STATEMENT OF CASE.

The action is a consolidated proceeding brought by petitioner against respondents to recover for the accidental death of her husband under policies of insurance issued by respondents whereby the latter promised to pay to the former stated sums for the loss of life of her husband, resulting from bodily injuries, "effected solely through external, violent and accidental means" provided that disease or infirmity did not contribute to the death of the insured.

Plaintiff received jury verdict for $20,500, and timely judgment was entered, which was reversed by the Court of Appeals.

Insured had left his horse in the pasture of a friend for several days looking toward sale to the latter. (R 49.) After lunch on date of death, deceased, along with young daughter of his friend, and another young girl, went to the pasture to catch the horse for them to ride, stopping at tenant house, leaving girls there, getting several ears of corn to entice the horse, and going into the pasture, of some size, without bridle or saddle, to catch the horse and bring him back in. (R 35, 36.) He had ridden the horse many times before without bridle or saddle. (R 77.) He was seen on far side of pasture beckoning the horse to come to him, (R 38) but was not thereafter seen alive. An hour or two later, his lifeless body was found several hundred yards from the house, lying on his back on the ground in an open place, with his hands outstretched, with ears of corn, one bitten by horse, thrown off to side, with hat thrown to side, small bit of dirt in face, and small cut on

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cheek, from which blood had flowed directly to ground over his ear, and not down his face. (R 36, 41, 42.) There were heavy horse tracks leading up to his body from direction of far side of pasture, more deeply impressed at body, and then light horse tracks leading away from his body, in another direction. (R 42, 43.) Horse hair of the color of the horse was found in crotch of his trousers, which had been freshly laundered when put on that morning. (R 78.) There were no human tracks leading to or from the point where the body was found. (R 42.)

The deceased was 39 years of age, weighed over 200 pounds, was over six feet tall, not fat but of muscular build, never suffered any serious illness in his life and was feeling good on the morning of his death. (R 76.) There was no suggestion of suicide or foul play in the record.

In addition to cut on cheek of deceased, an autopsy was performed which complied with policy provisions as to external injuries.

SPECIFICATION OF ERROR URGED.

The Court of Appeals erred:

1. In prescribing a standard of proof in accidental cases requiring jury to be free of doubt as to how accident happened, although it appearing that the death involved was accidental of the sort charged in the petition.

2. In abrogating the preponderance of evidence rule in Georgia in determining cases based on circumstantial evidence.

3. In applying to the determination of this case, based on circumstantial evidence, the rules obtaining in criminal cases, that is, that plaintiff's cause must be established to a moral and reasonable certainty, and beyond a reasonable doubt.

4. In usurping the function of the jury as fact triers, there being in the case no error of law in trial involved, and the *undisputed, direct* evidence pointing conclusively to the fact of accidental death, of the sort charged, and it being admitted by respondents in their brief before Circuit Court, that the jury was authorized to find from medical evidence that insured did *not* die from *natural* causes, and in this situation the jury was deprived of the right to infer, from *undisputed* and *preponderating direct* evidence that the death in this case was accidental.

REASONS FOR GRANTING THE WRIT.

The effect of the Circuit Court's ruling is to deny the jury its inherent right to find the facts, from a pattern of circumstances which dictate only one conclusion, and to lay down the novel and arbitrary rule in accidental death cases that it is not sufficient to prove accidental death of the sort charged, but is necessary, in the face of admitted proof that injury sustained was accidental in one of several kindred ways, to go further and detail the exact manner

of the accident, and the minute details thereof, which means that hereafter in the ambit of the influence of this decision, it will be impossible to prove any accidental death, or injury, by circumstantial evidence.

The decision is more far reaching than merely this case. It writes into every accident policy, regardlesss of its terms, the provision that no benefits will be payable unless there are eye witnesses to the accident, and provides no coverage when the painter, the farmer, the mechanic, and others are following their trades without the protection of eye witnesses.

The manifest general hurt in permitting this decision to stand, aside from the grievous wrong to plaintiff in this cause, is that it will constitute a precedent in all circumstantial evidence cases, the language of the decision so clearly pointing out that the evidence shows that deceased met his death in one of several *accidental* ways, all devolving around his relations with the horse, but since the jury could not reach a "definite conclusion" as to which of the *accidental* ways he died, and the infinitesimal details of that way, the cause fails.

Nowhere in the decision is it made to appear that the result turns on the true question of whether insured's death was *accidental* or *not accidental,* and if permitted to stand it openly impairs and aborts the terms of the insurance contract involved, which provides payment for death by *any* accidental means (the exclusions not being pertinent), and conflicts with the precedents of every appellate court affecting the forum in which this cause was tried.

BRIEF COMMENT ON FACTS.

In order that the court may properly consider our sincere charges that the Court of Appeals has in this cause laid down arbitrary standards of proof requirement in accidental cases where no eye witnesses present, and has completely abrogated rules of determination of civil causes by preponderance of evidence, and deprived right of jury to draw inferences, from direct evidence, of accidental death, we shall make brief comment on pertinent facts of the case.

FACT THAT INSURED MIGHT HAVE MET DEATH FROM DISEASE OR OTHER NATURAL CAUSES ELIMINATED FROM CASE.

In determining this cause, the Circuit Court of Appeals completely overlooked the fact that respondents here, in their reply brief before that court (page 20) conceded that the jury trying this cause was authorized to find that disease did not cause or contribute to the rupture of the aorta of deceased which caused his death.

We quote the admission in their brief, page 20, to which reference is made, as follows:

> "(4) Appellee contends that disease did not cause or contribute to the rupture."
>
> "(a) As to this evidence of Dr. Adams for plaintiff and of Dr. Funke for the defendant was in conflict. *The jury chose to believe* Dr. Adams on this jury question. We recognize that we can-

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not contend that the plaintiffs proof failed entirely on this question."

The death in this case was either from accidental means, or natural causes. The respondents eliminated the proposition that it was from natural causes, leaving the record in such state that it could only be held that he died from accidental causes, but with this helpful relief, the Court of Appeals yet fell into the error of holding, in effect, that the issue was not whether insured met his death accidentally, of the sort charged, as contemplated by his insurance contract, but whether or not we proved the inconsequential details of the accidental death, such as whether he was thrown from the left or right side of the horse, whether he was thrown in the air and fell, or merely slipped to the ground, whether the horse was running or walking when he fell, whether he was mounting the horse, and something unusual, unexpected or accidental happened, although voluntary, and, if so, on which side of the horse he was mounting, or whether he had dismounted and the horse reared and knocked him down, and *ad infinitum*.

We cannot believe, in the face of all of the precedents on this type of case, this will be permitted to remain as the standard by which cases involving circumstantial evidence are proven.

UNDISPUTED FACTS FROM WHICH JURY COULD DRAW INFERENCE THAT DECEASED MET DEATH ACCIDENTALLY AS CHARGED.

1. It was undisputed that deceased was found dead at a spot on open ground and that heavy horse tracks lead up to the body, deeper at that point, and lighter ones lead away, from which *undisputed, direct* evidence the jury could infer that deceased had ridden to this spot, that the horse was running, then reared up and threw him, and then walked away in another direction.

2. It was undisputed that the hat of deceased was thrown off some distance from his body, from which *undisputed, direct fact* the jury could properly infer that Williams had been on the horse, and was thrown in the air, and in the act his hat was thrown from his head and away from his body, which would not have been the case had he voluntarily dismounted the horse, or if not on the horse, and had merely slumped to the ground from heart attack.

3. It was undisputed that he had a cut on his cheek from which blood flowed to the ground over his ear, and not down his face, from which *undisputed fact*, the jury could properly infer that he received the cut from the horse in the act of being thrown or falling, since no blood flowed down his face, the wound had to be simultaneous with his fall and not prior thereto, and there being no bushes or trees around, the wound had to come from the horse.

4. It was undisputed that no human tracks lead to and from the point where the body was found, from which *undisputed, direct fact* the jury could properly infer that deceased rode the horse to the point of his accidental fall.

5. It was undisputed that there were horse hairs of the color of horse involved in the crotch of the pants worn by deceased at time, and that these pants were freshly laundered that morning, from which *undisputed, direct fact*, the jury could further properly infer that he rode the horse to the point of death.

CONFLICT OF DECISION WITH LAWS OF GEORGIA, CIRCUIT COURT OF APPEALS, AND UNITED STATES SUPREME COURT.

The question of the Court of Appeals laying down a new and arbitrary standard of proof in cases involving accidental death or injury proven by circumstantial evidence, is interrelated with and embraces our charge that the decision abrogates the preponderance of evidence rule, exacts the same proof as required for conviction in criminal cases, and usurps the function of jury as fact trier, and will be discussed as one problem, separating only the holdings of the several forums whose rulings have been cast aside in this case.

GEORGIA LAW ON PREPONDERANCE OF TESTIMONY, AND RIGHT OF JURY TO INFER FROM CIRCUMSTANCES, AND TO HAVE MENTAL CONVICTION ALTHOUGH NOT FREE FROM DOUBT.

Sections 38-105 and 38-106 (a and b respectively below), of the Code of Georgia of 1933, as amended, are as follows:

(a) "Moral and reasonable certainty is all that can be expected in legal investigation. *In all civil cases, the preponderance of evidence is considered sufficient to produce mental conviction.*"

(b) "By preponderance of evidence is meant that superior weight of evidence upon the issues involved, which, *while not enough to wholly free the mind from reasonable doubt*, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other."

These sections have been interpreted in Georgia to mean that in a civil case a plaintiff is not bound to prove his case beyond a reasonable doubt (*Seymour v. Bailey*, Supreme Court Reports 76, page 339(3), and "contentions may be proved as well by circumstances as by direct testimony, and in a civil case, the plaintiff is only required to establish his contentions by a preponderance of the testimony, and *he is not required*, even when relying on circumstantial evidence, to establish them to the *exclusion of every other reasonable hypothesis.* (*Central of Ga. Ry. Co. v. Trammell*, 23 Georgia Appeals, page 26(5).

And in *Southern Grocery Stores, Inc. v. Greer, 63 Georgia Appeals, page 583*, the court applied the follow-

ing rule in a case where the circumstances were not as capable of selection of one theory of accident, as in our case:

> "3. Where there is evidence which points to any one theory of causation, indicating logical sequence of cause and effect then there is a juridical basis for a determination as to how the event happened, and a jury will be authorized to *select this theory*, notwithstanding the evidence of other plausible theories with or without support in evidence."

And this is begging the question, for in our case, the various theories pointed out by the Circuit Court itself were *all accidental*, and of the *sort alleged*, and would all *support recovery*, and none would support the defendant's side of the question of whether death was *accidental* or *not accidental*.

RULE OF FIFTH CIRCUIT COURT OF APPEALS IN SIMILAR CASES SUPPORTING OUR POSITION THAT PLAINTIFF DOES NOT HAVE TO "PIN-POINT" DETAILS OF ACCIDENTAL DEATH.

May we quote from several Fifth Circuit Court of Appeals cases which clearly demonstrate that all that is required in cases of this class is that the plaintiff prove the *sort of accident* alleged, and that the jury does not have to be free of doubt in its findings, and does not have to reach a "definite conclusion" as to the details of the accident so long as there are circumstances, based on direct evidence, from which they might infer accidental death,

and so long as the facts are such that the minds of reasonable men may differ as to the fact of accidental death.

AETNA INSURANCE COMPANY v. CAFFEE, 286 FEDERAL REPORTER, PAGE 660, FIFTH CIRCUIT.

In the *Caffee* case, there were no eye witnesses and the circumstances were not as strong as ours and involved an elderly man suffering from disease. He was seen driving his car, from one side of road to the other going around lake, and was later found dead, on the ground, clear of his car, which had run into an abutment on or near the road. The Court of Appeals stated that the jury could have felt that he lost control over his car on account of physical condition, but that it was entitled to draw inferences from circumstances shown by direct evidence, that it was accidental. The trial court refused to charge jury that they should find for defendant if there was any doubt in their minds as to the cause of death of insured, which refusal was approved by Circuit Court of Appeals in this language: "The jury might have been in *serious doubt* and yet they might well have believed from the preponderance of the evidence, as they evidently did, that death was due to the cause alleged in the declaration. The Court of Appeals further said that under the defendant's contentions, "It would be practically, if not quite, impossible to prove an accident by circumstantial evidence."

The decision in our case, in which the court sets forth several *accidental* ways in which deceased could have

met his death, all involving relations of horse and insured, and then holds that jury must "definitely conclude" the exact manner of his *accidental* death, forever closes the door on proof of accidental death by circumstantial evidence.

NEW YORK LIFE INSURANCE COMPANY v. HATCHER, 115 F2d 52, FIFTH CIRCUIT.

This was a case with no eye witnesses, and involved a fall on the floor, without the intervention of any other agency, such as the horse in our case. Hatcher was an old and disabled man, and upon regaining consciousness after his fall, stated that he must have fainted. The Court of Appeals held that even so, his own declaration was not binding on his beneficiaries, and they could recover if they proved that death was "of the sort described". "Sort" means only of the "class or kind."

May we quote further from the *Hatcher* decision to show that the jury may "speculate" as to the details of the accident, if there is any evidence, circumstantial or direct, upon which it might base its "guess" or "speculation," as follows:

> "On the question whether the fall which caused the injury which in turn caused the death was an accident, or itself due to disease, we think the jury could from the circumstances conclude that the injured slipped and fell rather than that he fainted and fell. *Either was possible.*"

Bear in mind that the Fifth Circuit Court of Appeals in the *Hatcher* case permitted speculation as to whether

death was *accidental* or *not* accidental. In our case, the only speculation, if any was involved, was which of several related *accidental* ways the deceased met his death, and irrespective of result of the speculation, the end result of the jury speculation would be an *accidental* death, as contemplated by the insurance contract.

STEWART v. TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA 81 F2d 25, FIFTH CIRCUIT.

In this case there were no eye witnesses, a man was found on the floor of his hotel room, who had been ill for several days. The physical layout in the room indicated that a man might have possibly accidentally stumbled and fell. The district court directed a verdict for defendant, giving as his reason that there was no substantial evidence to go to the jury *"as to how the injury occurred."* The Fifth Circuit Court reversed the ruling holding that "if deceased did stumble, *or in any other manner accidentally fall* against some object, alone causing his death, we think clearly, the plaintiff is entitled to recover, for the fall and death would not have been due to disease." The jury, it was further held, was entitled to consider the situation and location of objects in the room, and other circumstances in determining "how the wound occurred."

Should not the Fifth Circuit Court of Appeals, in our case, have adhered to the standard in the *Stewart* case, and held that *"if the deceased did fall off,* or was thrown off, or knocked down by the horse, or *in any other manner did accidentally fall"* then we were entitled to recover.

It is conceded in the brief of respondents before the Circuit Court that jury could have properly found from *disputed* evidence that disease did not cause rupture of aorta. By the same token, and the rules obtaining, could not have reasonable and impartial minds, under the *undisputed, direct* evidence, concluded that Williams rode the horse to the point of death and was thrown—?

The jury had the right, although there might have been doubt as to the exact manner in which he was thrown, to have concluded that he was accidentally thrown or knocked to the ground by the horse. Further, even if he had fallen without the intervention of the horse, if it was an accidental fall, the plaintiff was entitled to recover.

According to the theory of Court of Appeals viewed in light of *Stewart* and *Hatcher* cases, we would have had more of an accidental case, if there had been no horse, and the deceased had merely been found dead in the woods, similar to *Stewart* and *Hatcher* cases, which is reducing the matter to the absurd, and places us under the paradox of weakening our case in order for it to be approved under existing precedents.

We make this argument by way of emphasizing the danger of permitting the decision in our case to stand.

THIS DECISION CONFLICTS WITH CASES FROM OTHER CIRCUITS.

While a much weaker case than ours, that of *Brownlee v. Mutual Benefit Health and Accident Association, 29 F2d, page 71, NINTH CIRCUIT*, poses the same question.

Can the jury speculate as to the sort of accident involved, so long as the facts support such an inference or speculation—?

This involved a man starting on mountain climb, running into snowstorm and never being seen again, dead or alive. Verdict directed for defendant, the contentions of insurance company in that case being similar to defendant's in our case, as follows:

> "Assuming that insured is dead, the proof leaves the manner of his death wholly in the realm of speculation. Based on conjecture his death may be explained in various ways, among which are the following: (1) That insured fell and sustained bodily injuries which resulted in his death (2) That insured became lost, and having exhausted his food supply, starved to death (3) That insured, having become tired and exhausted, stopped to rest and subsequently froze to death, or (4) that insured because of physical strain to which he had been subjected, died of natural causes."

The court, in reversing the direction of verdict for defendant, held that:

> "It was the province of the jury to determine from the evidence submitted whether the insured met with accident by falling into a crevasse of snow or ice, or into a canyon, or became lost and starved to death, tired and froze to death, or died from natural causes.
>
> . . . . *It is not necessary that evidence be of such weight as to preclude every possibility of error.*"

The *Brownlee* decision holds that the jury could speculate among several *accidental* means by which in-

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sured perished over against speculation that he died from natural causes. In our case the field of *speculation* is limited to selecting one of several *accidental* ways, admitted in the decision, in which insured met his death *accidentally* with the question of his having died from natural causes being eliminated.

This, of course, renders absolutely meaningless all of the precedents in this type of case in all forums.

CONFLICT WITH RULINGS OF U. S. SUPREME COURT.

The case of *U. S. Mutual Association v. Barry, 131 U. S. Supreme Court Reports, page 100, (33 L. Ed. 69)* involved three persons jumping to the ground from a platform several feet high. Two of them landed safely, while Barry was injured by the jump. There was no evidence of anything unusual in the jump. The jury found for plaintiff, and case found its way to the Supreme Court of United States, and judgment of lower court affirmed. As bearing on the question in our case, the trial court was requested to charge the jury that if plaintiff did not prove details of accident as alleged in petition, the defendant was entitled to recover. The court refused to give these instructions, confining the accident to "pin-point" details, but did charge the jury as follows:

> "We understand from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous

necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns: *Was there or not any unexpected or unforeseen or involuntary movement of the body, from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control, in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body in the downward movement, or in the act of alighting on the ground?* These are points directly pertinent to the question in hand.

"And I instruct you that if Dr. Barry jumped from the pjlatform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body as he expected, or would naturally expect, such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then any resulting injury was not effected through any accidental means. (But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, or strain of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstances which interfered with or changed such a downward move-

> ment as he expected to make, or as it would be natural to expect, under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulting, then the injury would be attributable to accidental means.")

It appears that the jury was given the choice of finding that something accidental happened during the course of the fall in either of *several ways*, which we say is the rule in our case.

May we say that the *Barry* case has never been questioned or qualified by the Supreme Court in the many years since it was decided, and has been uniformly followed in the State of Georgia.

We humbly feel that the Supreme Court of the United States, in the case of *Lavender v. Kurn* (90 Law Edition, page 916, 327 US 645-654) completely destroys any semblance of correctness in the circuit court's decision in our case.

One cannot, with any degree of reason, accept both as the law of the land.

In the *Lavender* case a switch-tender was found dead near track with fractured skull shortly after he had thrown a switch to permit train to back in station, where it was shown that there was a mail hook hanging down loosely on the outside of the mail car of the backing train, and considering the height and swing-out of the hook, the existence of an uneven mound of cinders and dirt near

the track, and the nature of deceased's duties, it was held to be a fair inference that he had been struck on the back of the head by the hook, although there was contrary evidence indicating that he could not possibly have been hit by the hook, and it was possible that he might have been murdered by one of the many tramps frequenting the switch yards. *There were no eye witnesses.* May we quote briefly from the opinion written by Justice Murphy, as follows:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factural dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for the appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co. 318 US 54, 67, 68, 87 L ed 610, 617, 618, 63 S Ct 444, 143 ALR 967; Bailey v. Central Vermont R. Co. 319 US 350, 353, 354, 87 L ed 1444, 1447, 1448, 63 S Ct 1062; Tennant v. Peoria & P. U. R. Co. 321 US 29, 35, 88 L ed 520, 525, 64 S Ct 409, 15 NCCA (NS) 647. See also Moore, Recent Trends in judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act, 29 Marquette L. Rev. 73.
>
> "It is no answer to say that the jury's verdict involved *speculation and conjecture.* Whenever facts

are in dispute or the evidence is such that fair-minded men may draw different inferences, *A measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.* Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The Circuit Court cites the case of *Pennsylvania RR Company v. Chamberlin*, 228 US 333, 339, 53 S. Ct. 77 L.ed. 819, as authority for the position that circumstances equally consistent with several hypotheses prove neither, and that the party having the burden must fail.

The question in the *Chamberlin* case was whether accidental death, or not, and on the side of accidental death was evidence of circumstances from one who did not see the accident, as against direct evidence of several eye witnesses that the occurrence claimed by circumstantial evidence did not happen. There is no similarity between the two cases, or the issues therein.

Would the jury be authorized to find an accidental death in a case where a painter, in good health, was seen to mount a ladder to a house, with paint brush and bucket

prepared to go aloft and paint the house, and hours later he was found dead near the point where base of ladder was located, the ladder having fallen to ground, his cap thrown to the side, his bucket and brush thrown to the side, fresh paint high on the wall showing that he had been up the ladder painting on the wall, no cuts or abrasions on him except small cut on face from which blood was flowing to ground."

Armed with the decision in this case, defendants in an action for his accidental death, can then dare to boldly admit that the painter's death was accidental, but prevent recovery by showing that although it was accidental, the jury could not reach a "definite conclusion" as to whether the painter fell from the top of the ladder and was killed, or whether he descended the ladder and it fell on him and killed him, or whether he descended and stumbled and fell, and pushed the ladder over in the act of falling. The jury would have *to speculate* as to which of these accidental ways he met his death.

This is not the law of our land, and the danger of the holding in this case has such widespread application that this court should hear this cause and deter the harmful influence of this decision.

It was well and applicably said in the case of *William v. Reading Company*, 175 F2d, page 34 (305) that "it is not the rule that circumstantial evidence need exclude everything which the ingenuity of counsel may suggest as having possibly caused or contributed to the death."

CONCLUSION.

The points presented by this petition seem to us so important to all accident policy holders, and all parties who must prove their cause by circumstantial evidence, as to justify the consideration of this court.

Respectfully submitted,

ROBERT CULPEPPER, JR.,
FRANK S. TWITTY,
Camilla, Georgia.

Office - Supreme Court, U. S.
FILED
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HAROLD B. WILLEY, Clerk

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1954

No. 88

MARGARET SHIVER WILLIAMS,

Petitioner,

VS.

CAROLINA LIFE INSURANCE COMPANY,
COLONIAL LIFE & ACCIDENT INSURANCE COMPANY, and
LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE,

Respondents.

Petition of Respondents for Rehearing of Order Granting Certiorari and Reversing Judgment

and

Brief in Support of Petition for Rehearing and in Opposition to Grant of Writ of Certiorari

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In the
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October Term, 1954

No. 88

MARGARET SHIVER WILLIAMS,

Petitioner,

VS.

CAROLINA LIFE INSURANCE COMPANY, COLONIAL LIFE & ACCIDENT INSURANCE COMPANY, and LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE,

Respondents.

Petition of Respondents for Rehearing of Order Granting Certiorari and Reversing Judgment

The Carolina Life Insurance Company, The Colonial Life & Accident Insurance Company, and The Life & Casualty Insurance Company of Tennessee pray that this Honorable Court grant rehearing of its order of October 14, 1954, granting the petition for writ of certiorari and reversing the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case. These petitioners further pray that the order of October 14, 1954, be vacated and that the writ of certiorari be dismissed and the petition therefor denied, or in the alternative, that the order of October 14, 1954, be modified to permit the case to be assigned for argument.

REASONS FOR GRANTING REHEARING AND DISMISSING THE WRIT.

It is respectfully submitted that a rehearing of the

order of October 14, 1954, should be granted on the following grounds:

1. In granting the petition for certiorari, this Court did not have before it grounds appropriate for the granting of the writ conforming to the rules and procedures formulated by the Court.

2. In summarily reversing the judgment of the Court of Appeals, this Court has precluded petitioners from presenting substantial argument that the decision of the Court of Appeals correctly applied and followed the controlling substantive law of Georgia, and that all procedural requirements of the federal forum were observed.

CERTIORARI SHOULD NOT HAVE BEEN GRANTED.

In setting forth their reasons against the propriety of granting certiorari petitioners for rehearing at the outset ask the indulgence of the Court, in that briefs in opposition to the application were not filed. In reaching the decision as to whether or not to file such briefs, petitioners had regard for, and placed reliance upon, the following circumstances:

1. In the petition for certiorari there appeared none of the grounds or reasons justifying review on certiorari specified either in Rule 38(b) of the old rules, or in Rule 19(1)(b) of the new rules of this Court:

(a) No conflict of decisions between Courts of Appeal upon the same subject existed because the law of Georgia, which was controlling, eliminated any such conflict;

(b) The petition did not contend that any important state or territorial question was decided in a way in conflict with applicable state or territorial law;

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(c) It did not contend that any important question of federal law was raised which should be settled by this court;

(d) No federal question having been raised, obviously none could be in conflict with the applicable decisions of this court; and, finally,

(e) The petition claimed no departure in either lower court from the accepted and usual course of judicial proceedings.

Conceding, as we must, that the specifications of the above rule neither control nor fully measure this court's discretion, still, under those specifications it appeared clear that recognizable grounds for certiorari did not exist.

2. In the second place, this court has declared on numerous occasions that the granting of the writ is not warranted merely to review the evidence or inferences drawn from it, or to discuss specific facts. *General Talking Pictures Corporation v. Western Electric Co.*, 304 U.S. 175, 178; *United States v. Johnston*, 268 U.S. 220, 227; *Southern Power Company v. North Carolina Public Service Co.*, 263 U.S. 508, 509; *Houston Oil Co. of Texas v. Goodrich*, 245 U.S. 440; *New York Central & Hartford R. R. Co. v. Kinney*, 260 U.S. 340, 345.

Since the order, sought to be reviewed on rehearing, does not set forth the reasons for granting certiorari, we believe it to be a not unwarranted assumption that the court, in granting certiorari, has either undertaken to review the facts in the light of the applicant's limited statement of the case, or has granted certiorari because of our procedural failure to file a response to the petition for certiorari.

We cannot but believe that this Honorable Court was

misled by the statement of the question presented as set forth on page 2 of the petition for certiorari. The question was not whether it was a jury function to determine which of several possible accidental injuries caused death, but whether, in the present case, there was any evidence, other than mere guess or speculation, upon which such a jury determination could be based.

Believing that justice will here be done not by departing from the procedures set out above, but by adhering thereto, petitioners for rehearing respectfully, and at this juncture, ask the indulgence of the Court to the extent of considering petitioners' argument against the granting of certiorari.

We have briefed this question fully.[1] We hopefully ask for this Court's consideration thereof in connection with this petition for rehearing and that the Court, under the circumstances, will not bar petitioners for rehearing from relief to which they can demonstrate themselves entitled.

THIS COURT SHOULD NOT BY SUMMARY REVERSAL DEPRIVE PETITIONERS FOR REHEARING OF THE OPPORTUNITY OF PRESENTING ARGUMENT THAT THE COURT OF APPEALS RENDERED A CORRECT DECISION.

Inasmuch as the order granting certiorari and reversing the judgment below states no reasons therefor and cites no rule or precedent, we frankly can only guess at why such summary treatment was accorded this case. This Court might have found reasons for the grant of certiorari without so stating, as it seems to be its practice simply to enter an order of grant or denial;

[1]Brief is set forth immediately following this petition. (Infra, p. 9).

but we are unable to find but one other case where this Court has summarily reversed a final judgment without a stated reason or the citation of some previous decision.[2] Some may have escaped our attention. And in the single case discovered the writ was vacated upon a timely petition for rehearing and certiorari was denied.[3]

This Court has repeatedly emphasized the importance of a statement of the grounds of a decision both as to facts and law as an aid to litigants and to the Court itself. *Baltimore & Ohio Railroad Co. v. United States*, 279 U.S. 781. This Court, by its practice has imposed such a rule upon itself and has emphasized its importance to those courts subject to its revision and supervision.

It is true that in some cases this Court has granted a petition for certiorari and at the same time has summarily reversed the judgment below. *Securities & Exchange Commission vs. Otis & Company*, 338 U.S. 843; *Dye v. Johnson*, 338 U.S. 864; *Ewing v. Gardner*, 341 U.S. 321; *Sweeney v. Woodall*, 344 U.S. 86; and this although briefs for both the petitioner and respondent were filed. Some authorities, more experienced than ourselves, suggest that such summary reversals are only entered where the decision below is so clearly erroneous as to make argument before this Court a waste of time. *Supreme Court Practice* by Stern and Gressman, (2nd Edition) pp. 155-157. What is impressive to us, however, is that in each of these cases the Court wrote opinions or cited in the order some authority upon which its action was based.

In search of some clue as to the significance of a summary reversal where no reasons were stated or

[2] *Thibaut v. Car and General Insurance Corp.*, 332 U.S. 571

[3] *Thibaut v. Car and General Insurance Corp.*, 332 U.S. 828.

citations given, we also find, from text authority, admonition of the danger inherent in not appearing in opposition to a petition for certiorari. *Jurisdiction of the Supreme Court of the United States*, by Robertson & Kirkham, (Wolfson & Kurland Edition), Sec. 315, pp. 600-603. According to that text (citing the Clerk of this Court) some twenty cases during the October Terms 1928-1947, were reversed or vacated on consideration of the petition for certiorari alone, no response having been filed. Upon examination of these cases we find that this Court, in all save one, either wrote a full opinion or in entering its order either cited authority or stated the reasons for its action. The one case in which this was not done was the case of *Thibaut v. Car and General Insurance Corp.*, 332 U.S. 571. In that case the Court simply reversed a judgment in much the same fashion as the instant case, but subsequently upon petition for rehearing, this order was vacated and certiorari was denied. **332 U.S. 828.** Petitioners rely on that case as a precedent authorizing the present petition.

We cannot believe that summary reversal ensues as a matter of course merely because no response is filed to a petition for certiorari. Nothing in this court's rules or in its announced decisions would seem so to indicate. Nor do we believe that the petition in this case discloses any basis for granting the writ by any of the criteria there established. We can only conclude therefore that because of the volume of pending applications,[4] and because of our own dereliction in not properly briefing the Court, the insignificance of the issues presented (certiorari-wise) was overlooked. Such a brief is set out immediately following this petition. We concede our previous dereliction in this respect and respectfully

[4]See dissenting opinion of Mr. Justice Frankfurter in *Bankers Life & Casualty Company v. Holland, et al.*, 346 U.S. 379.

request that rehearing be granted and that our brief be considered, believing earnestly that the ends of justice will thus be best served.

CONCLUSION.

For the reasons set forth above, it is respectfully urged that rehearing be granted and that, upon such rehearing, the writ of certiorari to the Court of Appeals for the Fifth Circuit be dismissed and the petition therefor denied, or in the alternative, that the order of October 14, 1954, be modified to permit the case to be assigned for argument.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is in compliance with Rule 58(1) of the Rules of this Court.

LAMAR W. SIZEMORE
Counsel for Petitioners

SUPREME COURT OF THE UNITED STATES
October Term, 1954

No. 88

MARGARET SHIVER WILLIAMS,

Petitioner,

VS.

CAROLINA LIFE INSURANCE COMPANY,
COLONIAL LIFE & ACCIDENT INSURANCE COMPANY, and
LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE,

Respondents.

Brief in Support of Petition for Rehearing and in Opposition to the Granting of Certiorari

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 210 F. (2d) 477.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition for certiorari.

QUESTION PRESENTED

Whether, in the present case, there was any evidence, other than mere guess, speculation, theory, conjecture, possibility or surmise, upon which a jury determination could be based.

CONSTITUTIONAL PROVISION, STATUTE OR REGULATION

No constitutional provision, statute or regulation, federal or state, is involved.

STATEMENT

We know of no more exact, fair or impartial statement of this case than that made by the Court of Appeals and we are loath to attempt at this juncture to improve upon it. We do not quarrel with the petitioner's statement of the case (Petition, p. 4, 5) so much for what it states as for what it omits, however, we are unable to accept his statements and analysis of ultimate fact (Petition, p. 8-11), and insist that the evidential facts disclosed by the record do not support such factual conclusions. At this point we deem it appropriate to concisely restate the case for the convenience of this Court.

(a) The Case

The petitioner for certiorari, as plaintiff, filed separate actions (R. 2-5) (R. 8-11) (R. 14-21) in the United States District Court for the Middle District of Georgia to recover on policies of insurance issued by these respondents, as defendants, whereby each of the latter promised to pay the former a stated sum for the loss of life of Theodore Williams, husband of the plaintiff, resulting from bodily injuries "effected solely through external, violent and accidental means," provided that disease or infirmity shall not contribute to the death of the insured. Defendants filed responsive pleadings. (R. 24-25) (R. 25-26) (R. 27-30). The actions were thereafter consolidated. The complaints were amended

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on the date of trial (R. 6-8) (R. 11-13) (R. 21-23), and a jury trial had.

At the conclusion of plaintiff's evidence and again at the close of all of the evidence, defendants moved the court to direct the jury to return a verdict in their favor on the ground that the plaintiff had failed to prove that the death of the insured resulted directly, independently and exclusively of all other causes from bodily injuries effected solely through external, violent and accidental means. The jury returned verdicts in favor of the plaintiff. Thereafter defendants filed motions to set aside the verdicts and enter judgments in their favor in accordance with their prior motion, or in the alternative to grant a new trial. The motions were overruled. Upon the judgments entered in favor of the plaintiff, consolidated appeals were taken to the Court of Appeals. On February 23, 1954, the judgments appealed were reversed; on March 20, 1954, rehearing was denied, and on April 21, 1954, an extraordinary motion for rehearing was denied. 210 F. (2d) 477. Application was then made to this Court for writ of certiorari.

(b) The Facts

On November 17, 1951, at about 3:00 P.M. (R. 36) Williams, a farmer 37 years old, six feet three and a half inches tall and weighing approximately 220 pounds (R. 76) (R. 31) went into a pasture on the farm of a neighbor some five or six miles from his home (R. 48) to catch a horse and bring it to a nearby barn for two children to ride. (R. 36). On this occasion he took with him several ears of corn. (R. 6). He did not carry a bridle, a frequent custom of his. (R. 77). Price, a tenant on the farm (R. 39), who was then hunting rabbits

(R. 39) in the pasture and the adjoining woods (R. 38) saw Williams signaling and whistling for the horse but no one saw him catch the horse or attempt to mount the animal, or saw him alive near the horse. A short time thereafter Price observed Williams again. This time he was walking toward the highway and away from the horse. (R. 38).

After an interval of about thirty minutes, while still hunting, Price fired one shot. (R. 38). This was at a point approximately four or five hundred feet from the point where the body of Williams was subsequently found. (R. 38).

Thereafter Price returned to the area where he had first seen Williams and at this time his attention was attracted to two children who were then calling for Williams (R. 38) and at the same time he observed the horse grazing nearby (R. 39) and in the proximity to the place where Williams' body was later found. Price walked up to where the children were and then undertook to run the horse up to the barn and into the lot. This he eventually did, but it required some 30 or 40 minutes, the horse continuing to run around in the immediate area where the body of Williams was later found. (R. 39). After running the horse up he bridled it, and saddled it for the children. (R. 39).

Thereafter, about 6:00 P.M., Mrs. Price went into the pasture to get her some firewood and there she discovered the body of Williams in the same area (R. 46) about 50 feet from the pasture edge near some high weeds. (R. 36).

The deceased was found lying on his back (R. 41) and the only external mark or wound on the body was a small and very superficial cut one-half inch long and one-eighth inch deep on the right cheek (R. 42), and

from which blood had flowed to the ground over his ear. (R. 42). There were no other lesions (R. 51) and no external signs of any bruises or trauma. (R. 57). There was dirt on his face (R. 43), his cap was 3 to 5 feet from his body, two ears of corn were on the ground about 4 feet from his right side (R. 42) and one ear of corn was lying about a foot from his left hand. (R. 44). Some of the ears showed evidence of having been bitten off by the horse and some corn had been shelled from one of the ears. (R. 44). There were horse tracks in the immediate area. These tracks approached from the south, went right around the body where they were much more deeply impressed in the earth than elsewhere, and then led away to the east. (R. 42, 43).

On previous occasions Williams had been seen to "jump on" the horse and ride bareback without a bridle (R. 77); that the horse, although small (R. 47) and gentle (R. 77) was gun shy and on a previous occasion had thrown a rider when a gun had been fired near him. (R. 43).

Evidence was also introduced by the plaintiff that 7 or 8 weeks after the accident the clothing of the deceased was examined by the deceased's widow (R. 78) and deceased's uncle (R. 43) and that reddish brown horse hair of a color matching the horse above described was discovered thereon. This clothing was not offered in evidence. (R. 44).

The cause of death, according to undisputed medical testimony, was a rupture of the aorta, the great trunk artery of the body which carries the blood away from the heart and feeds it to the entire body. (R. 75). Plaintiff introduced evidence to show that the insured was not suffering from any known pre-existing disease or infirmity. (R. 30, 31) (R. 76). Defendant introduced

evidence to show a diseased aorta. (R. 100). Plaintiff introduced evidence to the effect that the rupture could have been caused by a fall such as would result from being thrown from a horse or otherwise. (R. 69). The same expert also testified that a rupture also might be caused by some unusual activity, stress or strain, as for example, where an individual steps off a curb or has a rupture because of the unusual stress or strain in trying to catch himself from falling; or is resisting injury or is resisting anything that might cause discomfort to him or injury; or who suffers a rupture because of a strain in jumping on or over an object. (R. 60). Defendants introduced undisputed evidence to the effect that the usual and ordinary way to mount a horse bareback is to grasp with one hand the mane of the horse, put the other hand on its back, give a spring and jump on the horse and land on your stomach and then twist around and sit up with legs astride the horse. (R. 92). Plaintiff's medical expert testified that the rupturing of the aorta can be caused by pressure on the stomach muscles and the abdominal muscles. (R. 61, 62).

(c) The Evidentiary Contentions

Plaintiff contended from the evidence that Williams was on the horse, that the horse was frightened by a gunshot, that Williams was thrown from the horse and that the fall was the cause of his death.

The defendants contended that there was no evidence that the horse and the deceased were alive together at any time and that the testimony adduced from plaintiff's own witnesses equally support each of two inconsistent theories, one that Williams met his death as a result of a voluntary exertion or strain, and the other that it was due to an accident; and that the jury was thus confronted with the mere choice of inconsistent

propositions, neither of which were established by legitimate proof.

ARGUMENT

The issue in the present case is not one of substantive law, but of the sufficiency of evidence. The Court of Appeals has not laid down any novel proposition of law. In fact it has applied principles so often repeated as to have become axiomatic. The petitioner for certiorari has failed altogether to properly state the question presented. She would have this Court believe that the Court of Appeals laid down a rule requiring a plaintiff to pin-point the details of an accident, which is not what that Court did. That Court merely found that there was no evidence of any accident, but that the verdict was based upon mere speculation. What this Court is really asked to do is to review the evidence, something which this Court has expressed a disinclination to do.[1]

On this record the decision of the Court of Appeals is manifestly correct. There are not present in the petition for certiorari any of the grounds or reasons when measured by the criteria established by this Court which would make the granting of certiorari appropriate.

I.

The Decision Below Is Clearly Correct

The correctness of the decision of the Court of Appeals can be reduced almost to a few basic propositions of law when the evidence is reviewed in detail. There is no evidence that the insured was in fact on the horse,

[1] *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S., 508; *Houston Oil Co. v. Goodrich*, 245 U.S. 440; and other cases cited in the Petition for Rehearing. (Supra, p. 3).

about to get on the horse, or ever took hold of the horse. The evidence revealed that the insured went to the pasture to get the horse for some children to ride.

There is no direct evidence or any eye witnesses as to how death occurred. The cause of death was determined pathologically from autopsy.

In civil cases the circumstantial evidence rule is that when a party upon whom the burden of an issue rests seeks to carry it, not by direct proof, but by inferences, he has not, in this reasonable sense, submitted any evidence for a jury's decision until the circumstances he places in proof tend in some proximate degree to establish the conclusion he claims; and for this, the facts shown must not only reasonably support the conclusion, but also render less probable all inconsistent conclusions, *White v. Executive Committee of the Baptist Convention*, 65 Ga. App. 840, 845, 16 S.E. (2d) 605; *Georgia Railway & Electric Co. v. Harris*, 1 Ga. App. 714 (3), 57 S.E. 1076, and it has been held not sufficient that such circumstantial evidence points equally one way or the other. *Federal Reserve Bank v. Haynie*, 46 Ga. App. 522, 168 S.E. 112.

It is axiomatic that when evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of a party found to maintain one of those propositions against the other is necessarily wrong. *Kimberly v. Reed*, 79 Ga. App. 137, 148, 53 S.E. (2d) 208; *New York Life Insurance Co. v. Ittner*, 64 Ga. App. 806, 824, 14 S.E. (2d) 203. It is more consistent with legal justice that a given case should fail for want of evidence, than that it should succeed merely because the truth cannot be shown. *Savannah River Lumber Company v. Bush*, 37 Ga. App. 539, 140 S.E.

890; *Collett v. Atlanta, Birmingham & Coast Railroad Co.*, 51 Ga. App. 637, 181 S.E. 207.

This Court in *Pennsylvania Railroad Company v. Chamberlain*, 288 U.S. 333, at page 339, said:

> "We therefore have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

This proposition that where two inferences can be drawn from evidence neither is proved is also the law of Georgia. *Gulf Life Insurance Company v. Bolt*, 80 Ga. App. 779, 783, 57 S.E. (2d) 455. Verdicts neither rest upon guess or conjecture, *Shapleigh, et al v. United Farms Company*, 100 F. (2d) 287, 289 (5th Cir.), nor can they rest on a presumption based on a presumption, *Looney v. Metropolitan Railroad Company*, 200 U.S. 480, 488, nor for that matter can an inference resting only upon an inference be permitted. *Georgia Railway & Electric Co. v. Harris*, supra.

The plaintiff had the burden of proving that the death of the insured resulted directly, independently and conclusively of all other causes from bodily injuries effected solely through external, violent and accidental means. Otherwise, the defendants were not liable upon their contract of insurance. The plaintiff had the burden of showing the death was of the sort described. *New York Life Insurance Company v. Hatcher*, 115 F. (2d) 52, 53 (5th Cir.). Plaintiff not only was required to plead, but also required to prove "accident" as set forth in the policy in order to make out a prima facie case. There was no burden on the defendant companies to

prove by a preponderance of the evidence that the injury and the consequence of death did not result from accidental means, but on the other hand that the burden was on the plaintiff throughout the trial to prove an accident such as is defined in the policy. *Greene v. Metropolitan Life Insurance Company*, 67 Ga. App. 520, 531, 21 S.E. (2d) 465; *New York Life Insurance Company v. Jennings*, 61 Ga. App. 557, 559, 6 S.E. (2d) 431; *Ryan v. Continental Casualty Company*, 47 F. (2d) 472, 473 (5th Cir.).

Neither death nor injury can be regarded as resulting from accidental means where the facts show that no unforeseen, unexpected, unusual, unintentional or involuntary muscular effort or exertion occurred in the doing of the act which preceded the death or the injury. *Cobb v. Preferred Mutual Accident Assn.*, 96 Ga. 818, 22 S.E. 976; *Continental Casualty Company v. Pittman*, 145 Ga. 641, 89 S.E. 716; *Felton v. Metropolitan Insurance Company*, 19 Ga. App. 127, 91 S.E. 228; *Johnson v. Aetna Life Insurance Company*, 24 Ga. App. 431. Cases decided by the Fifth Circuit are to the same effect, *Carswell v. Railway Mail Assn.*, 8 F. (2d) 612, 613; *Davis v. Jefferson Standard Life Insurance Co.*, 73 F. (2d) 530, 531, and this Court, in *Landress v. Phoenix Mutual Life Insurance Co.*, 291 U.S. 491, said at page 496:

> ". . . . for here the carefully chosen words defining liability distinguish between the result and the external means which produce it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental."

II.

There Is No Conflict of Decision

The petitioner for certiorari has alluded to a conflict of decisions between Courts of Appeal of different circuits. (Petition, p. 17). The petitioner has not contended that the rules of admissibility of evidence, sufficiency of evidence or any other rule of adjective law applied by the federal court is different from Georgia adjective law. Jurisdiction of the federal court was predicated upon diversity of citizenship. This Court in *Erie Railroad v. Thompkins*, 304 U.S. 64, held that state decisions were determinative of the substantive law and were to be applied by the Courts of Appeal in diversity cases and were also binding on this Court. This Court has said as to questions controlled by State law that conflict among circuits is not of itself a reason for granting a writ of certiorari. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206. Consequently, conflicts of decisions of Courts of Appeal in non federal matters under the *Erie* doctrine of necessity can reveal no more than a difference between the laws of different states.

Petitioner further alludes to a conflict between decisions rendered by the same Court of Appeals, (Petition p. 13). It is the usual rule that the later decision in the point of time is considered controlling in the decisions of the same court. We are aware of no case in which this Court has granted certiorari to resolve a conflict of decisions within the same Court of Appeals except on an occasion when one panel of Judges does not feel themselves bound to follow a prior decision on the same issue rendered by another panel of the same Court. No such situation here is alleged to exist, or does in fact exist.

Conflict of the decision of the Court of Appeals with Georgia law is suggested by the petitioner (Petition, p. 12), but petitioner does not illustrate wherein the conflict exists and wherein it was misapplied by the Court of Appeals. In response to this contention, respondents rely on the authorities contained in Division 1 of their Argument.

Petitioner has suggested further that the decision of the Court of Appeals is in conflict with rulings of this Court. (Petition, p. 19). This she surely must do by way of make-weight since the Court of Appeals based its decision upon this Court's ruling in *Pennsylvania Railroad Company v. Chamberlain*, 228 U.S. 333. The petitioner has not suggested nor has she urged that this Court overrule that decision; neither does she suggest that it fails to state a sound and salutary proposition of law. We have been unable to find where that decision has been reversed or modified by this Court.

CONCLUSION

The petitioner has raised no federal question important to decision or in conflict with applicable decisions. The petitioner has claimed no departure from judicial decorum requiring the supervisory power of this Court and respondents respectfully submit that there exists no conflict of decisions between Courts of Appeal or between the Court of Appeals of the Fifth Circuit and applicable state law. The petitioner asks this Court to review the evidence, the inferences drawn from it, and to discuss the facts which this Court has repeatedly said is not usually a proper exercise of its certiorari jurisdiction.

Therefore, it is respectfully urged that rehearing be granted and that upon such rehearing the writ of cer-

tiorari to the Court of Appeals for the Fifth Circuit be dismissed and that the petition therefor denied, or in the alternative, that the order of October 14, 1954, be modified to permit the case to be assigned for argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LAMAR W. SIZEMORE, certify that I have served counsel for the Petitioner for Certiorari by mailing via air mail a copy of the foregoing "Petition for Rehearing" and "Brief in Support of Rehearing and in Opposition to the Grant of Certiorari" to Robert Culpepper, Jr., Esquire, Camilla, Georgia, and Frank S. Twitty, Esquire, Camilla, Georgia, with sufficient postage affixed in compliance with Rule 33 (3) (b) of the Court.

This November ....., 1954.

LAMAR W. SIZEMORE,
Counsel of Record for Petitioners for Rehearing.

October 14, 1954.

Decisions Per Curiam.

No. 88. Williams *v.* Carolina Life Insurance Co. et al. C. A. 5th Cir. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Robert Culpepper, Jr.* for petitioner. Reported below: 210 F. 2d 477.